Supreme Court, U.S.
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No. 90-1055

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES OTHEL BORUFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has standing to contest the seizure of marijuana that border patrol agents found during a search of a pickup truck in which petitioner was not a passenger and to which he had concealed his connection in order to avoid detection of his role in a drug smuggling operation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 18a-40a) is reported at 909 F.2d 111. An earlier opinion of the court of appeals (Pet. App. 1a-17a) is not reported, but is noted at 818 F.2d 863 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1990. A petition for rehearing was denied on September 11, 1990 (Pet. App. 41a). The petition for a writ of certiorari was filed on December 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of ten years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed. Pet. App. 18a-40a.

1. On November 21, 1985, Border Patrol Agent Donald Newberry observed a Lincoln Continental, followed by a pickup truck with a camper top, heading toward the Mexican border on Highway 385 in Texas. Russell Taylor was driving the pickup truck; petitioner was driving the Lincoln. The two vehicles were traveling at the same speed and bore Texas license plates. The vehicles fit a "smuggler" pattern common to the area. Pet. App. 3a-4a, 21a.

The following morning, Agent Newberry saw the same two vehicles traveling north in tandem on Highway 385. As petitioner's car passed him, Agent Newberry saw petitioner put something to his mouth "as though it was a microphone," and noticed a CB antenna on top of petitioner's car. Newberry followed the vehicles. Upon spotting Newberry's vehicle, petitioner made a U-turn and headed south. Newberry continued to follow the pickup truck, and radioed Border Patrol Agent Harris Clanton to stop petitioner's car. Petitioner then made a second U-turn, and headed north. Pet. App. 4a-5a, 22a-23a.

Agent Newberry pulled up behind the pickup truck and saw camping gear riding high in the camper. Newberry signalled Taylor to stop. Newberry asked Taylor if he would mind opening the camper top. Taylor complied, exposing the camping gear. Inside the camper, Newberry discovered 591 pounds of marijuana. He then arrested Taylor. Pet. App. 5a-7a, 24a.

In the meantime, Agent Clanton pursued petitioner. When petitioner approached the point where the pickup truck was parked, Agent Newberry signaled him to stop. The CB antenna was no longer on the roof of petitioner's car, but was in plain view in the back seat. Newberry arrested petitioner and advised him of his *Miranda* rights. In petitioner's car, the agents subsequently found a walkie-talkie radio identical to one recovered from the pickup truck, a CB radio, the CB radio antenna, and $4,700 in cash. As Agent Clanton drove petitioner to the Border Patrol station, petitioner denied any knowledge of Taylor, the pickup truck, and its contents. Pet. App. 24a-25a.

2. Following their indictment on conspiracy and drug possession charges, petitioner and Taylor moved to suppress the evidence seized from the pickup truck. After a hearing, the district court granted the motion to suppress, concluding that the agents had no reasonable suspicion to stop or search the vehicle. Pet. App. 8a.

The government took an appeal from the suppression order. The court of appeals affirmed as to Taylor, but reversed and remanded as to petitioner. The court concluded that the stop of the pickup truck was not supported by reasonable suspicion; it held, however, that there was no evidence establishing petitioner's standing to contest the stop and search of the pickup truck that Taylor had been driving. Accordingly, the evidence seized during the search of the pickup truck was suppressed as to Taylor, but not as to petitioner. Pet. App. 9a-17a.

3. Following the remand to the district court, the court held a hearing during which petitioner attempted to establish Fourth Amendment standing. Petitioner's evidence was as follows: Petitioner, accompanied by Taylor, purchased the pickup truck for the purpose of smuggling marijuana from the Mexican border into Texas. Petitioner gave the salesman $2,000 as a downpayment, later obtained two cashiers

checks bearing Taylor's name to pay the balance of the purchase price, and instructed the salesman to put the title in Taylor's name. Petitioner and Taylor agreed that it would be best to put Taylor's name on all documents relating to the truck, since Taylor would be driving the truck for the smuggling operation. Pet. App. 19a-20a, 28a.

Petitioner and Taylor flew to Dallas, Texas, where they obtained automobile insurance for the truck and a Texas driver's license for Taylor. The truck's registration and insurance were placed in Taylor's name. Petitioner later purchased a camper top for the truck, listing Taylor's name on the invoice. Petitioner also installed on the truck a grill and bumper guard, a CB radio, and fog lights. Petitioner and Taylor understood that if the truck was ever sold, petitioner would receive the money. Pet. App. 20a.

The district court denied petitioner's motion to suppress, concluding that he had no legitimate expectation of privacy in the pickup truck. The case proceeded to trial, and petitioner was convicted on both counts.

4. The court of appeals affirmed. Pet. App. 18a-40a. The court of appeals upheld the district court's determination that petitioner lacked standing to challenge the search of the pickup truck. *Id.* at 29a-37a. "Despite [petitioner's] asserted ownership interest," the court explained, petitioner "did everything he could do to disassociate himself from the truck in the event it was stopped by law enforcement officials." *Id.* at 32a-33a; see *id.* at 35a. The court noted that petitioner placed the title, insurance, and registration in Taylor's name; drove in a separate vehicle; and left his position in front of the truck when he saw the Border Patrol vehicle. The court concurred in the district court's finding that "these actions 'clearly show[ed] [petitioner's] intention to leave any "expectation of privacy" to Taylor.'" *Id.* at 33a.

The court found further support for its conclusion in the fact that petitioner was not present when the truck was

stopped and searched and that petitioner disavowed any knowledge of the truck and its contents after his own vehicle was stopped. Pet. App. 33a-34a. The court concluded (*id.* at 35a-36a):

> [Petitioner] completely disassociated himself from the truck both legally and factually for the express purpose of avoiding detection. Even ignoring the admitted illegal purposes for this arrangement, [petitioner's] asserted expectation of privacy in the truck is not one "that society is prepared to recognize as reasonable." * * * An individual cannot reasonably expect to maintain privacy in a vehicle when he or she has rendered all of the normal incidents of ownership, including title and possession, to another and disavows any knowledge of or interest in it.[1]

ARGUMENT

Petitioner renews his claim (Pet. 12-40) that he had a legitimate expectation of privacy in the pickup truck and thus has standing to challenge its stop and search.

1. In order to challenge a search or seizure, a defendant must demonstrate that the intrusion infringed his own reasonable expectation of privacy. *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980); *United States* v. *Salvucci*, 448 U.S. 83, 91-93 (1980). Such a showing is necessary because "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by

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[1] In the lower courts, petitioner also challenged the stop and search of the Lincoln. The district court found that he had no standing with respect to Lincoln. The court of appeals affirmed that determination and held, in the alternative, that by the time the Lincoln was stopped the Border Patrol had probable cause to believe it was involved in drug smuggling. Pet. App. 28a, 36a-40a. Petitioner does not challenge the stop or search of the Lincoln in this Court.

a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978). See *United States* v. *Salvucci*, 448 U.S. at 91-93; see also *Minnesota* v. *Olson*, 110 S. Ct. 1684, 1687 (1990); *United States* v. *Payner*, 447 U.S. 727, 735-736 (1980).

Whether a person's expectation of privacy is legitimate is not determined by reference to "arcane distinctions developed in property and tort law." *Rakas* v. *Illinois*, 439 U.S. at 143. Thus, an ownership or financial interest in the item searched is not sufficient, in and of itself, to create a legitimate expectation of privacy. *Rawlings* v. *Kentucky*, 448 U.S. at 105. Rather, it is necessary to focus on the defendant's interest in avoiding the Fourth Amendment intrusion at issue in each particular case. For instance, the driver of a car may challenge a stop of the vehicle, but not a search of the personal belongings of any passengers. The passengers, in turn, may not challenge a search of the glove compartment or any other area of the car in which they have no personal expectation of privacy. Here, therefore, the pertinent question is whether the stop of the truck and its subsequent search, with Taylor's consent and in petitioner's absence, violated any of petitioner's legitimate expectations of privacy.

The facts foreclose any such showing. At the time the truck was stopped and searched, Taylor was its only occupant. The essence of petitioner's drug smuggling scheme was to make it appear to all concerned that Taylor was the owner of the truck and was in sole control of its operation. The only "interest" petitioner retained was the ability to claim the proceeds of any sale of the truck and, while it was used in drug smuggling, to monitor its operation from a safe distance. The limited control petitioner exercised over the truck was insufficient to create a legitimate expectation of privacy in its interior areas. Petitioner put himself in a

position to choose between coordinating the drug shipment with Taylor and, if the risk of detection warranted, denying any knowledge of the truck and abandoning his investment. When confronted by the Border Patrol agents, he chose the latter option – until, of course, the possibility of a successful motion to suppress made it expedient for him to reassert his interest in the truck.[2] Under these circumstances, the stop of the truck and its search with the consent of the sole occupant infringed no legitimate privacy interest of petitioner's.

As the Eleventh Circuit stated in rejecting a claim very similar to petitioner's (*United States* v. *McKennon*, 814 F.2d 1539, 1545 (1987)):

> We do not believe that the Fourth Amendment was designed to protect the privacy interests of an individual who conspires to transport contraband, perceives the possibility that the container will be searched, severs all appreciable ties with the courier in an effort to escape criminal liability, and then asserts an interest in the container after the contraband and the conspiracy have been discovered in order to articulate an ex-

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[2] Petitioner contends (Pet. 27) that although he was not in physical possession of the truck when the search took place, he maintained joint control over the truck. The court of appeals rejected that assertion, finding that at the time of the search, petitioner had left his position in front of the truck. The court further found that petitioner could not have been in radio contact with Taylor at the time of the search because Taylor was outside the truck with an officer as the truck was being searched. Pet. App. 33a-34a.

There is also no merit to petitioner's factual challenge to the court of appeals' determination that petitioner attempted to disassociate himself from the truck. See Pet. 35-38 & n.26. In particular, petitioner does not discuss the damaging evidence that, after his arrest, he denied any knowledge of the truck, its driver, and its contents.

pectation of privacy and suppress evidence of criminal activity.

2. Petitioner claims (Pet. 29-31) that he took steps—*i.e.*, purchasing and installing a camper on the back of the truck and outfitting the truck with two-way radios enabling him to monitor the truck and its contents—that demonstrated an attempt to protect his privacy interests in the truck. The fact that petitioner modified the pickup truck to make it easier to conceal contraband does not suggest that he retained an interest in the truck giving rise to a reasonable expectation of privacy.[3] It is true, of course, that the purpose of the camper top was to enhance the truck's ability to carry large quantities of marijuana without detection. That modification, however, added nothing to the privacy interest petitioner retained in the vehicle at the time it was used to carry contraband and was stopped and searched. Whatever modifications he made before turning the truck over to Taylor, the fact remains that he deliberately disassociated himself from the truck and thereby surrendered the kind of interest in it that is necessary to support Fourth Amendment standing.

Similarly, the two-way radios petitioner purchased were designed to allow petitioner to monitor the truck from a distance. That deliberately qualified form of supervision does not give rise to an expectation of privacy that society

[3] The Fourth Amendment does not protect purely subjective expectations of privacy; rather, it protects only those "expectation[s] that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). See also *Smith* v. *Maryland*, 442 U.S. 235, 240 (1979); *Rakas* v. *Illinois*, 439 U.S. at 143-144 n.12. "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities." *United States* v. *Jacobsen*, 466 U.S. 109, 122 (1984).

recognizes as reasonable or legitimate. See *Rakas* v. *Illinois*, 439 U.S. at 143-144 n.12; *United States* v. *Sarda-Villa*, 760 F.2d 1232, 1236-1237 (11th Cir. 1985); *United States* v. *McKennon*, 814 F.2d at 1543. It bears no resemblance, for instance, to a lawful owner's ability openly to exclude members of the public from the owner's property.

3. The court of appeals rejected, without discussion, petitioner's claim that Fourth Amendment standing could be based on his status as a co-venturer in a scheme involving the use of the truck to transport drugs. As petitioner notes (see Pet. 31-35), some Ninth Circuit decisions have based a finding of standing on an individual's participation in an illegal venture in which participants exercise joint control and supervision over the place searched. See *United States* v. *Broadhurst*, 805 F.2d 849, 851-852 (1986); *United States* v. *Quinn*, 751 F.2d 980 (1984), cert. granted, 474 U.S. 900 (1985), cert. dismissed, 475 U.S. 791 (1986); *United States* v. *Pollock*, 726 F.2d 1456, 1465 (1984); *United States* v. *Johns*, 707 F.2d 1093, 1100 (1983); *United States* v. *Perez*, 689 F.2d 1336 (1982).

It remains our view, as we argued in this Court in *Quinn*, that a person's participation in a drug smuggling conspiracy does not add anything to a claim of standing to challenge a search or seizure. As noted, the interest in privacy protected by the Fourth Amendment is a personal right, derived from an individual's interest in the property that is subject to a search and seizure, and a defendant may not vicariously assert the rights of third parties as a ground for seeking the suppression of evidence against him. Confederates in a criminal enterprise – whether described as co-conspirators, co-defendants, or co-venturers – "have been accorded no special standing" to raise one another's Fourth Amendment rights. *Alderman* v. *United States*, 394 U.S. 165, 172 (1969); see also, *e.g.*, *United States* v. *Leon*, 468 U.S. 897, 910 (1984); *Standefer* v. *United States*, 447

U.S. 10, 23-24 (1980); *Brown* v. *United States*, 411 U.S. 223, 230 & n.4 (1973).[4] Petitioner's position as a co-venturer in a drug smuggling operation involving the use of the truck should not, therefore, enhance his ability to challenge the stop and search at issue here.

To the extent that Ninth Circuit decisions have tied Fourth Amendment standing to participation in a drug smuggling venture, they are inconsistent with decisions of other courts of appeals.[5] In our view, however, this case does not offer the Court an occasion to resolve this conflict. It is doubtful that petitioner would prevail even under the approach applied in the Ninth Circuit. None of the cases involved a defendant who had taken steps comparable to those peti-

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[4] As then Chief Justice Burger explained in dissenting from the dismissal of certiorari in *Quinn*, 475 U.S. at 794:

> The Court of Appeals' conclusion that Quinn's status as a "co-venturer" with those who exerted control over the vessel and his possessory interest in the contraband gave him standing to challenge the search is similarly misguided. Under this flawed analysis, if a defendant has a sufficient link to seized contraband to incriminate him, the guarantees of the Fourth Amendment attach. But it is the established rule that suppression of evidence "can be successfully urged *only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.* Coconspirators and codefendants have been accorded no special standing." *Alderman* v. *United States*, 394 U.S. 165, 171-172 (1969) (emphasis added).

[5] Other courts of appeals have recognized that a defendant's participation in a joint criminal venture does not establish a legitimate, personal expectation of privacy under the Fourth Amendment. See, *e.g.*, *United States* v. *Manbeck*, 744 F.2d 360, 373-374 (4th Cir. 1984), cert. denied, 469 U.S. 1217 (1985); *United States* v. *Brown*, 743 F.2d 1505, 1506-1507 (11th Cir. 1984); *United States* v. *Knotts*, 662 F.2d 515, 518 (8th Cir. 1981), rev'd on other grounds, 460 U.S. 276 (1983); *United States* v. *DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981); *United States* v. *Davis*, 617 F.2d 677, 690 (D.C. Cir. 1979), cert. denied, 445 U.S. 967 (1980).

tioner took to disassociate himself from a vehicle being used to carry drugs. For instance, in *Perez*, the case on which petitioner principally relies, the Ninth Circuit emphasized that the defendants "never abandoned the truck, and were present at the time of the search, which was directed against all of them." 689 F.2d at 1338.[6] In the instant case, petitioner was not present at the time of the search, purposefully concealed his connection to the truck, and, when confronted by the Border Patrol, specifically denied any knowledge of the truck, its driver, or its contents. *Perez*'s reasoning, therefore, would not support a decision in petitioner's favor.

[6] It was on this basis that the court distinguished its prior decision in *United States* v. *Culbert*, 595 F.2d 481 (9th Cir. 1981). In *Culbert*, the court held that a defendant had no reasonable expectation of privacy in a rental truck when he had abandoned it and was not present when it was searched.

In *Pollock*, as in *Perez*, the defendant's standing was based not only on his participation in a scheme to manufacture methamphetamine, but also on "his activities in and presence on the premises at the time of the search." 726 F.2d at 1465. In *Broadhurst*, although all participants in a scheme to cultivate marijuana at a greenhouse were not present at the time of the search, there was no indication that steps had been taken to conceal their connection to that facility. 805 F.2d at 851-852. In *Quinn*, the defendant's standing to object to the search of a ship was based upon his apparently open ownership of the vessel along with his participation in a venture to smuggle marijuana into the United States. 751 F.2d at 981. In *Johns*, the Ninth Circuit found that pilots who had dropped off packages of drugs retained an expectation of privacy in the drugs, given the fact that they were in a bailor/bailee relation with other defendants and were not to be paid for the drugs until the marijuana had been delivered. 707 F.2d at 1099-1100. Each of these cases provides support for the proposition (with which we disagree) that participation in a drug trafficking conspiracy enhances a co-conspirator's standing to challenge a search or seizure of property employed in the conspiracy. However, none of them squarely addresses the question presented by this case, which is whether a concealed owner retains the sort of interest required to confer standing.

As the court of appeals properly observed (Pet. App. 35a-36a), "[a]n individual cannot reasonably expect to maintain privacy in a vehicle when he or she has rendered all of the normal incidents of ownership, including title and possession, to another and disavows any knowledge of or interest in it."[7]

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[7] Nor does the decision of the court below conflict with that of *United States* v. *Dotson*, 817 F.2d 1127 (5th Cir. 1987), as petitioner asserts (Pet. 24-27). In *Dotson*, the defendant lent his car to a friend for the purpose of getting it washed and cleaned. Title to the car was in the name of the defendant's sister, although the car "for all practical purposes" belonged to him. 817 F.2d at 1134. The court held that the defendant had standing to contest the seizure of marijuana that was found in the car while his friend had temporary possession of it. The court explained that the fact that the defendant was not the legal owner, while certainly an important consideration, was not dispositive of the standing issue. Because the defendant was the legitimate possessor of the car for an extended period of time, the court found that the defendant had a legitimate expectation of privacy in the car. The court concluded that "[g]iven the limited nature of the bailment of the car to [his friend, the defendant] did not give up his expectation of privacy in the car by his temporary loan of the vehicle." 817 F.2d at 1135. Here, by contrast, as the court of appeals properly found, "[petitioner] did much more than loan the truck to a friend for a brief period of time. He completely disassociated himself from the truck both legally and factually for the express purpose of avoiding detection." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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